FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-906

UNITED AIR LINES, INC.,

Petitioner,

vs.

HARRIS S. McMANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

ARNOLD T. AIKENS,
KENNETH A. KNUTSON,
EARL G. DOLAN,
P. O. Box 66100,
Chicago, Illinois 60666,
Counsel for Petitioner.

Of Counsel:
PHILIP J. HOGAN.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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Six arguments have been advanced by the Respondent, McMann, in his brief in support of the decision of the Fourth Circuit in this dispute. Additionally, three arguments have been advanced by *amicus curiae,* National Retired Teachers Association, *et al.* in its brief in support of the Fourth Circuit's decision. United shall treat first with McMann's arguments, then treat with the arguments advanced by the *amicus* Teachers Association.

I.

McMANN'S ARGUMENT THAT POLICY CONSIDERATIONS FAVOR THE VIEW TAKEN BY THE COURT BELOW.

McMann urges this Court to support the decision of the Fourth Circuit in this case because, in "addition to . . . congres-

sionally enunciated policy, there are many other policy considerations which support the Fourth Circuit's decision." (Resp. br., p.9.) McMann then discusses such policy matters as the reduced level of earnings of retirees, the lessening of opportunities by retirees to accumulate earnings, the economic impact of later retirement dates on pension plans, the shifting age of the population of the United States, which is becoming older, the effect of retirements on social security and the psychological and sociological effects of retirement on retirees.

These "policy considerations" addressed to this Court by the Respondent are misdirected. It is for Congress to determine whether laws should be enacted or amended based upon policy considerations of the nature described by Respondent. As aptly stated by the Third Circuit in *Zinger* v. *Blanchette*, 549 F. 2d 901, 909 (3rd Cir. 1977) in answering the same arguments in that case:

> "Such arguments miss the mark when urged upon a court in support of a statutory interpretation. An exemption's merits are properly matters of legislative concern and evaluation. Congress has chosen to exclude retirements pursuant to bona fide retirement plans so long as the plan is not a subterfuge. That choice is binding upon us. As the Supreme Court recently noted, 'the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one.' *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 2567, 49 L. Ed 2d 520 (1976).
>
> We leave to congressional consideration the broad policy questions underlying the desirability of regulating the minimum age for compensated involuntary retirement. Factors such as the population's gradually increasing average age and the proper methods of insuring the stability of the Social Security Plan may argue for an even higher retirement age. On the other hand, unemployment prevalent among younger members of society and a developing trend to distribute available employment by the use of a four day work week pull in the opposite direction. Further, the enactment of the Pension Reform Act of 1974 may be an important factor, concerned as it is with the financial stability of retirement plans and transfer of benefits.
>
> The fact that the legislation requires the Secretary to study involuntary retirement and submit legislative recommendations to the President and Congress shows recognition of the problem by the legislature. It chose to await further data before deciding what, if any, further action is warranted. Legislation need not address itself to all the problems in any given area at one time. Particularly when the effects of a policy are not susceptible to accurate prediction. Congress may well decide that prudence dictates a tentative, experimental approach. It is not the function of the courts to accelerate that process when Congress unquestionably is acting within its proper scope."

In short, as the Third Circuit noted, policy considerations of the nature expressed by Respondent are properly directed to the legislature, not the courts. Even McMann in his brief (p. 16) recognizes that: "Congress is the branch of government which is institutionally designed to identify and weigh various social values", citing *Railway Express Agency, Inc.* v. *New York*, 336 U. S. 106, 109-110 (1949). Accordingly, the Respondent's "policy consideration" arguments are not properly addressed to this Court, whose function it is to interpret the law as written.

II.

McMANN'S ARGUMENT THAT SECTION 4(f)(2) OF THE ACT DOES NOT HAVE A "PLAIN MEANING" AND IT SHOULD THEREFORE BE CONSIDERED IN LIGHT OF ITS PURPOSE.

McMann argues at pages 14-18 of his brief that Section 4(f)(2) of the Act does not have a "plain meaning". In support of this contention, he notes that previous court decisions construing Section 4(f)(2) have differed in results reached. Citing the dissent in *Brennan* v. *Taft Broadcasting Company*, 500 F. 2d 212, 220 (5th Cir. 1974), the decision in *Zinger* v. *Blanchette*,

supra, as well as the decision of the 4th Circuit in *McMann*, he concludes that "[T]he examination of these three opinions can lead to only one conclusion: that Section 4(f)(2) has no 'plain meaning' ". McMann then asserts that since Section 4(f)(2) has no plain meaning, it should ". . . be construed in light of its purposes and legislative history." (Resp. br., p. 16.)

The fallacy in Respondent's approach is that he fails to recognize that none of the three courts has concluded that Section 4(f)(2) is ambiguous or does not have the plain meaning described by its wording. The Fourth Circuit, in *Taft*, referring to Section 4(f)(2), stated that (500 F. 2d 212, 215):

> "Its language is plain: 'a bona fide *employee benefit plan such as* a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. The key phrase is 'employee benefit plan'. The words, 'retirement, pension, or insurance', are added in a clearly descriptive sense, not excluding other kinds of employee benefit plans if, conceivably, there could be any."

At 500 F. 2d 217, the *Taft* majority also referred to the "unambiguous language of the statute", clearly refuting any indication that it thought the language unclear in any way.

In *Zinger, supra*, the Third Circuit did not hold or state that the language of Section 4(f)(2) was ambiguous or that its meaning was not clear. The Third Circuit's concern was with the question of whether the retirement program of Penn Central met the plain requirements of Section 4(f)(2). It concluded that it did—that the plan was concededly *bona fide* and the pension not so unreasonable as to brand the plan a subterfuge to evade the purpose of the Age Discrimination in Employment Act (the "Act").

And in *McMann*, the Fourth Circuit did not rule that the language of Section 4(f)(2) was in any manner ambiguous or unclear. To the contrary, the Fourth Circuit expressly stated that (542 F. 2d 217, 220):

> "We believe the language of the statute is clear, but that the *Brennan* court's interpretation of it is erroneous."

In reality, the language of Section 4(f)(2) is plain on its face. Each word used in Section 4(f)(2) is identifiable and has a specific, intelligible meaning. Those courts which have construed Section 4(f)(2) in the past have not had difficulty accepting the proposition that the language of Section 4(f)(2) is clear and unambiguous. Rather, the courts have faced difficulty in applying the *test* of Section 4(f)(2) to the facts of the various cases—in determining, for example, whether a particular benefit plan is *bona fide* or not, whether a plan is a subterfuge to evade the purposes of the Act or not. In sum, the language of Section 4(f)(2) is plain and clear. Its application to fact situations is the area in which disagreements have arisen.

III.

McMANN'S ARGUMENT THAT THE DECISION OF THE COURT BELOW IS CONSISTENT WITH THE LEGISLATIVE HISTORY OF THE ACT.

In part III of his brief, Respondent McMann argues that the decision of the Fourth Circuit in this case is consistent with the legislative history of the Act and with the intent of Congress. To support this proposition, McMann points, *inter alia*, to the joint House-Senate report on the bill with reference to the provision that became Section 4(f)(2). In part, that report states:

> "It is important to note that exception (3) [later enacted as Section 4(f)(2)] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vital to the legislation, and was favorably received by witnesses at the hearings."

McMann then recites certain excerpts from the transcript of hearings before the Subcommittees on Labor in the Senate and House in which various Senators and Representatives agreed that the exception in Section 4(f)(2) serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting their employment without necessarily including such workers in employment benefit plans.

McMann, however, completely ignores other parts of the legislative history which demonstrate beyond question that Congress purposefully intended to *include* involuntary retirements within the Section 4(f)(2) exemption in *addition* to the right accorded employers to exclude older workers from participation in benefit plans to facilitate their hire.

It should be noted in this connection that McMann concedes on page 22 of his brief that involuntary retirements are not prohibited by the Act. He states:

> "It should be pointed out that no party to this case has argued, nor did the court below hold, that all involuntary retirement is prohibited by the Act."

In conceding that not all involuntary retirements are prohibited by the Act, McMann necessarily admits that the Act permits at least some involuntary retirements. This permission in the Act presumably appears in Section 4(f)(2), since it does not appear elsewhere in the Act. This being the case, McMann must concede that Section 4(f)(2) of the Act permits an involuntary retirement when made pursuant to a *bona fide* retirement plan which is not a subterfuge to evade the purposes of the Act. Such being the fact, it is idle for McMann to quote the Committee's reports and Congressmen's speeches as though the *sole* purpose of Section 4(f)(2) was to permit employers to exclude older applicants from benefit plans in order to facilitate their hire. Assuredly, the latter purpose is *one* purpose of Section 4(f)(2), and perhaps the prime purpose, but as the legislative history clearly shows, it is by no means the *sole* purpose.

McMann omits mention of that important part of legislative history which establishes that involuntary retirements are also included within the Section 4(f)(2) exception. Briefly summarized, the legislative history shows that on January 23, 1967, the President recommended legislation covering employees from ages 45 to 64 which "provided an exception for special situations . . . where the employee is separated under a regular retirement system." (113 Cong. Rec. pp. 1089-1090.) The Presidential backed bills introduced into the House and Senate specifically provided that it would not be unlawful to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act. Senator Javits of New York, whose home state already had a similar exception permitting involuntary retirements in accordance with established pension plans, did not disagree with this proposal as far as it went, but stated it did not go far enough as an exemption. He stated he was concerned about the operation of established pension plans as a potential impediment to the hiring of older workers and hence proposed a *broadening* of the exemption. In part he said, "The administration bill, which permits involuntary separation under bona fide retirement plans meets only part of the problem." (Hearings on S. 830 before Subcommittee on Labor at pp. 27-28, 1967.) He then proposed that "a fairly broad exemption be provided for *bona fide* retirement and seniority systems which will facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." (*Id.*, pp. 27-28.) The "fairly broad exemption" referred to by Senator Javits later became the existing Section 4(f)(2). Clearly, it retained the "involuntary retirement" feature of the Administration's bill.

The Department of Labor had been involved in the development of the Act as early as June, 1965, when the Secretary of Labor, under mandate of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-15, reported to Congress on the problem

of age discrimination (111 Cong. Rec. 1296, 1965). In the following year, pursuant to Section 606 of the 1966 amendments to the Fair Labor Standards Act (§ 606, 80 Stat. 845), the Secretary was directed to develop specific legislative proposals "for implementing the conclusions and recommendations contained in his report on age discrimination" as required by Title VII. The Administration's bill (S. 830, 90th Cong., 1st Sess., 1967) and the Presidential message explaining that bill thus reflected over two years of study by the Department of Labor on the age discrimination problem and, as noted above, that bill plainly authorized involuntary retirement prior to age 65 under a retirement policy which was not a subterfuge to evade the purposes of the Act.

In both the House and Senate hearings, Secretary of Labor Wirtz was the lead witness. His remarks during the hearings indicated the Department of Labor's authorship of the bills (Senate hearings at pp. 36-55; House hearings at pp. 6-42).[1] When Secretary Wirtz was asked about the effect of the proposed legislation on existing pension plans, he stated that it was his judgment that the effect of the provision in 4(f)(2) was to "protect retirement plans" (Senate hearings at p. 53). Obviously, the Department of Labor, speaking through Secretary Wirtz, did not consider that the Act barred involuntary retirements; rather, he considered that Section 4(f)(2) protected the provisions of the plans as they existed.

Although the present form of Sec. 4(f)(2) differs slightly from its original form in the Senate and House bills, the difference is not significant. In commenting on the amendments which incorporate the present language of the Act, Secretary of Labor Wirtz, testifying before the House committee, stated:

> "In the bill reported out by the subcommittee in the Senate there is a change in the language which refers to this point

1. Hearings on S. 830 and S. 788 before Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 36 (1967) and Hearings on H. R. 3651, 3768 and 4221 before Gen. Subcomm. on Labor of House Comm. on Educ. and Labor, 90th Cong., 1st Sess. 6 (1967).

> which you raised earlier, the relationship of this to established pension plans. We count that change as not going to the substance and involving matters going to clarification which would present no problem." (Hearings on H. R. 4221 Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess., at 40.)

Of especial significance is the fact that organized labor perceived the Act as one which permitted involuntary retirements regardless of age and proposed amendments to outlaw such retirements. (See footnote 14 of United's initial brief.) These amendments were not adopted. The action of Congress in rejecting the amendments is clear evidence that Congress did not intend to bar involuntary retirements pursuant to *bona fide* benefit plans which were not subterfuges to evade the purposes of the Act.

In his brief, McMann omitted all reference to the legislative history described above. That legislative history conclusively shows, however, that Section 4(f)(2) covers more than the exemption of older workers from participation in benefit plans to facilitate their hire; it also permits employers, *inter alia,* to involuntarily retire employees at any age pursuant to a *bona fide* plan which is not a subterfuge to evade the purposes of the Act.

IV.

McMANN'S ARGUMENT THAT THE DECISION BELOW PROPERLY REFLECTS THE ASSIGNMENT OF THE BURDEN OF PROOF UNDER THE STATUTE TO THE EMPLOYER.

In its decision below, the Fourth Circuit stated in part that (Appendix, pp. 37, 38):

> "At oral argument, United's counsel conceded that if its plan, with its involuntary early retirement provision, were adopted now, it would probably violate the Act. Thus, its position is that the plan is immunized because it predates the Act. United rests on the *Brennan* Court's conclusion that any action required by a plan predating the Act is valid, since such a plan could never be a subterfuge. While

> we have already pointed out the fallacy in this reasoning, it is also refuted by the legislative history. The [Committee] report states that the exemption 'applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans.' It is difficult to reconcile this language with a construction of the statute which would treat new and existing plans *differently*, automatically validating the provisions of existing plans by refusing to inquire into their purpose. In addition, the legislative history makes it clear that the *maintenance* of a discriminatory plan is to be considered independently under the exemption. To avail himself of the exemption, an employer must demonstrate that a plan is not being maintained as a subterfuge to evade the Act, as well as showing benign establishment, in order to prevail. United has offered no justification for maintaining its early retirement provision after the Act became effective [footnote omitted]."

First, United takes issue with the assertion of the Fourth Circuit, above, repeated by McMann in his brief (p. 6), that at oral argument United conceded its plan, if adopted now, would probably violate the Act. The alleged concession occurred in response to a hypothetical question from Judge Craven concerning the legality of United's plan if it had been adopted after the Act and it required retirement at age 55. Rather than conceding that such a plan would have been unlawful, counsel simply stated that "we would have certainly a clear burden of showing that in the adoption of such a plan it would not be a subterfuge to avoid the purposes of the Act."[2] As United set

2. Transcript of tape of oral argument at p. 40. The complete colloquy with Judge Craven was as follows:

> "JUDGE CRAVEN: Mr. Rafferty, let me ask you a sort of hypothetical question: Assume that United has never had any retirement pension or insurance plan or bona fide employee benefit plan, they just never had one, can United adopt one today that provides for everyone to be—to quit work at age fifty-five and this comes under F2 and is perfectly all right?
>
> MR. RAFFERTY: Well, then I think we would have certainly a clear burden of showing that in the adoption of such a plan

(Footnote continued on next page.)

forth in its initial brief (p. 28), and as it contended before, this was not its burden in the instant case because its plan was adopted prior to the Act. Moreover, it is apparent from the colloquy that the discussion was as much concerned with the legality of an age 55 retirement provision as with the timing of the plan's enactment.

Additionally, United is of the view that the significance of the Committee report was misapprehended by the Fourth Circuit. The Committee's report simply stated that the *exemption* of Section 4(f)(2) applies to both new and existing plans and to both the establishment and maintenance of such plans. United reads this report to mean that regardless of whether a plan pre-dates or post-dates the Act, the exemption is available to the employer. Stated otherwise, an employer is permitted under the Committee report to utilize the exemption irrespective of the date of the plan as long as the conditions contained in the exemption are met. As applied to retirement plans, this means that an employer may involuntarily retire an employee under the terms of an existing plan or a new plan as long as the plan is *bona fide* and is not a subterfuge to evade the purposes of the Act.

(Footnote continued from preceding page.)

> it would not be a subterfuge to avoid the purposes of the act and were we able to do that—
>
> JUDGE CRAVEN: What facts would you have to show that it's not a subterfuge, you're adopting it today, you've never had a plan before, you adopt it today and everybody is going to quit at age fifty-five, it's mandatory too.
>
> MR. RAFFERTY: I'm rather hard pressed to answer, Your Honor, other than to point out that by mutual contributions the plan would be in fact more favorable than unfavorable to the individual employee to retire at age fifty-five or whatever the new act would provide.
>
> JUDGE HAYNESWORTH: Well, . . . in that situation only way that fact could possibly survive . . . relationship of . . . age fifty-five, it seems to me that it would be perfectly all right based on baseball players and basketball players and a few people like that.
>
> JUDGE CRAVEN: Boxers, age thirty perhaps."

In the case at hand, United took the position before the Fourth Circuit that since its plan was concededly *bona fide* and it pre-dated the Act by some twenty-six years, it obviously could not be a subterfuge to evade the purposes of the Act, which did not then exist. This is not to concede, however, that if the plan were inaugurated post-Act it would be presumed a "subterfuge" to evade the purposes of the Act. A post-Act plan which provides substantial benefits, for example, would not, in United's view, be barred by the Act. See *Zinger, supra.*

In the last part of the quotation, the Fourth Circuit asserted that United, to avail itself of the exemption, would have to demonstrate that its plan, in addition to having a benign establishment, was not being "maintained" as a subterfuge to evade the Act and that United offered no justification for maintaining its early retirement provision after the Act became effective. The fact is that United maintained its entire retirement package as it existed before the Act became effective since the language of Section 4(f)(2) authorized it "to observe the terms" of that plan. To repeat the testimony of Secretary Wirtz:

> ". . . the effect of Section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about. . . . It is intended to protect retirement plans."

As *amicus* Chamber of Commerce noted in its brief in support of United's Petition for a Writ of Certiorari in this case (p. 10), numerous provisions of employee benefit plans differentiate on the basis of age in addition to specifying retirement dates, such as in vesting provisions, benefit payment formulas, funding provisions and premium payments for insurance and health plans. The reasoning of the Fourth Circuit, if applied to retirement dates of pension plans, could be applied with equal force to *all* age-related benefit plans in *all*

aspects, including those mentioned above. Yet, such changes are clearly the very thing Congress intended to avoid by the Section 4(f)(2) exemption.

Further, the Fourth Circuit improperly imposed the burden of proving a negative on United—*i.e.*, a requirement that United prove its plan was *not* being maintained as a subterfuge to evade the purposes of the Act. For the reasons set forth at length in the *amicus* Chamber of Commerce's brief (pp. 7-9) the imposition of this burden on United was wrongful.

V.

McMANN'S ARGUMENT THAT THE CURRENT POSITION OF THE SECRETARY OF LABOR IS COMPATIBLE WITH THE INTERPRETATIVE BULLETINS ISSUED BY THE DEPARTMENT OF LABOR.

On pages 26-30 of his brief, McMann argues that the current position of the Secretary of Labor is compatible with the Interpretative Bulletin issued by the Department of Labor. In support of this argument, McMann asserts that the Interpretative Bulletin was issued immediately after the effective date of the Act and that such "time limitations are not conducive to thoroughness in the consideration of the regulations (Resp. br., p. 30), that the interpretation "is not a regulation with the force of law" (Resp. br., p. 27), and that there is "no conflict" between that section of the Interpretative Bulletin (§ 860.110) dealing with involuntary retirements and the current position of the Secretary (Resp. br., p. 28).

In response to the first point, and as United noted earlier in this reply brief, the Secretary of Labor was intimately involved in the preparation of the Administration's age bill for some two years prior to passage of the Act. Secretary of Labor Wirtz was the lead witness in the Committee hearings and assuredly was fully knowledgeable concerning the intent of Congress in adopting the Administration's bill. For McMann to ascribe to the Department of Labor a lack of thoroughness

in preparation of the Interpretative Bulletin because of the relatively short time involved between passage of the Act and the date the interpretations were issued is to ignore the long period of Labor Department involvement with the Act prior to its passage.

Moreover, because Secretary Wirtz was intimately familiar with the Act from its inception, Secretary Wirtz was in position to specify immediately what the Act meant and how it was intended to apply when enacted into law. The Interpretative Bulletin issued contemporaneously with the Act, thus, represents the views of the Department as to the intent of the Act at a time when that intent was fresh in mind. This is the very type of agency expertise which this Court indicated is entitled to "great deference" in *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971) and other cases.

McMann, in his brief, endeavors to downgrade the authority of the Interpretative Bulletin further not only by suggesting it was not thoroughly considered because of the alleged short time involved in its preparation, but also by stating that the Interpretative Bulletin ". . . is not a regulation . . . [and was] merely intended to be a practical guideline, and nothing more." (Resp. br., p. 27.) This assertion is contrary to the facts. Section 9 of the Act [29 U. S. C. § 628] authorized the Secretary of Labor to issue "such rules or regulations as he may consider necessary or appropriate" in carrying out the Act. The text of the Interpretative Bulletin was issued under authority of 29 U. S. C. § 621 et seq. (the Act) and other authorities. It was published in the Federal Register on June 21, 1968 (33 F. R. 9172) and codified under Title 29—Labor, Chap. V—Wage and Hour Division, Department of Labor, Subchapter C, as part 860. The Bulletin as issued to the public contained § 860:110 dealing with involuntary retirements prior to age 65 and this provision has remained unchanged to the date of this reply brief. Clearly, the interpretations were issued under authority of the Act and constitute the Secretary's official regulations.

McMann argues that because Section 860.1 of the Interpretative Bulletin provides it is subject to change by reason of court decisions or because the Department of Labor concludes, through its own internal processes, that its interpretation is incomplete or incorrect, subsequent changes are proper. But this reasoning misses the point. The Interpretative Regulations, which were issued contemporaneously with the Act by a Secretary of Labor who was thoroughly familiar with the intent of the Act, indicates best what construction should be placed on that Act. See *General Electric Co.* v. *Gilbert*, 429 U. S. 125, 142 (1976) on this point. Further, in addition to the Interpretative Regulations, several "Opinion Letters" were issued by the Wage-Hour Administrator supporting the proposition that involuntary retirements among the "protected group" pursuant to *bona fide* pension plans were permissible (See United's initial brief, p. 13).

McMann's argument that the position of the Department of Labor remains consistent is not borne out by the facts. Neither the Interpretative Bulletin nor any of the Wage-Hour Administrator's early opinions ever took the position that before an employer could involuntarily retire an employee under its pension plan, it would be obligated to show that there was a "business" or "economic" justification in order to observe the plan. As the Third Circuit noted in *Zinger, supra* (549 F. 2d at 908):

> "The [Interpretative] bulletin demonstrates the Secretary's [Wirtz] recognition of the difference between retirement with or without a pension; the financial effect of the latter being the same as outright discharge. *Succeeding Secretataries, however, have revised the Department's position.* * * *" (Emphasis added.)

Unmistakably, succeeding Secretaries of Labor have imposed conditions on the involuntary retirement of employees which were not present in the earlier interpretations of the Act by Secretary Wirtz and which do represent a substantive departure from the original interpretation.

VI.

McMANN'S ARGUMENT THAT UNITED'S PILOTS PENSION PLAN, BY ITS TERMS, DOES NOT MANDATE RETIREMENT AT AGE 60, AND THEREFORE CANNOT BE WITHIN THE EXCEPTION OF SECTION 4(f)(2).

In part VI of his brief, McMann indicates that since the pilots' pension plan, of which he was a member, does not define the words "normal retirement", and neither McMann nor his union had any control over the insertion of this language in the plan, those words should be construed as meaning other than mandatory retirement. There are several answers to this assertion.

First, the question of whether "normal retirement" means "mandatory retirement" in the context used at United is a factual question which has been decided by the courts and an arbitration board below and is not a matter in issue before this Court. The pilots' arbitration board, with Professor Archibald Cox participating as Neutral, rejected McMann's argument that "normal" meant "average", pointing out that (Appendix p. 23):

> "The argument is unpersuasive. 'Normal' means regular or standard, not average, not only as a matter of linguistics but also in the general context of retirement and pension plans and the settled practice at United."

The Fourth Circuit, in its decision below, stated (Appendix, p. 33):

> "While the meaning of the word 'normal' in this context is not free from doubt, counsel agreed in oral argument on the manner in which the plan is operated in practice. The employee has no discretion whether to continue beyond the 'normal' retirement age. United legally may retatin employees such as McMann past age 60, but has never done so: its policy has been to retire all employes at the 'normal' age. Given these facts, we conclude that for purposes of this decision, the plan should be regarded as one requiring retirement at age 60 rather than one permitting it at the option of the employer."

Concerning McMann's allegation that the language of the pension plan calling for "normal retirement" at age 60 was a matter beyond his and his union's control, it will suffice to state that the pension plan is subject to the collective bargaining process and at no time did the pilots' union on United request a change in the age 60 retirement provision, although it had opportunity to do so. Moreover, McMann himself joined the plan knowing the normal retirement age was age 60.

Inasmuch as the factual question of the meaning of "normal retirement" in the context of United's practice has been settled below, no issue remains on this point.

In its brief *amicus curiae,* the National Retired Teachers Association, *et al.* (hereinafter, the "Association") has advanced three arguments in support of the Fourth Circuit's decision. United will now turn to these arguments.

VII.

THE ASSOCIATION'S ARGUMENT THAT FACIALLY THE ACT PROHIBITS THE USE OF AN ARBITRARY AGE CRITERION FOR INVOLUNTARY RETIREMENT BEFORE THE AGE OF 65.

On pages 4-13 of its brief, the Association takes a completely different view of the Act than does McMann. As noted earlier, McMann stated in his brief (p. 22) that:

> ". . . no party to this case has argued, nor did the court below hold, that all involuntary retirement is prohibited by the Act."

The *amicus* Association, however, does not take the position that involuntary retirement prior to age 65 is permitted under the Act at all. It reads Section 4(f)(2) restrictively as establishing solely the right of employers to grant or withhold benefits and not the right of employers to retire employees involuntarily. As stated in its brief (pp. 11-12):

> "In short, the only possible interpretation of the benefit plan provision which harmonizes the language of the Act is that it refers only to the granting or withholding of fringe benefits and not to personnel actions affecting the existence or non-existence of employment before the age of 65."

The Association's position rests on its theory that the employee benefit provision is not, by its terms an "exception" to the Section 4(a) prohibition against age discrimination (Assoc. br., p. 6). In short, the Association takes the position that the only way to reconcile Section 4(f)(2) with the purposes of the Act (as set forth in Section 2 thereof) is to disregard any interpretation of Section 4(f)(2) which would permit involuntary retirements.

The Association fails to recognize, however, that Section 4(f)(2) cannot realistically be read as restrictively as the Association would wish. The preamble of Section 4(f) says "It shall not be unlawful" for the employer to take the actions described in Subsections 4(f)(1), (2) and (3). Subsection 4(f)(2) states in essence that it is permissible for an employer to observe the terms of a seniority system or *bona fide* benefit plan which is not a subterfuge to evade the purposes of the Act. To accept the Association's position, one would have to adopt the position that the right of an employer to observe the terms not only of a benefit plan, but of a "seniority" system as well, does not appear in the exception. To do so is to ignore the plain written language of Section 4(f)(2).

The last words of Section 4(f)(2), which provide that no employee benefit plan shall excuse the failure to hire any individual, do not give force to the Association's argument. Unquestionably, as mentioned earlier, *one* of the purposes of Section 4(f)(2) is to encourage the hiring of older workers by excusing their participation in certain benefit plans. But, contrary to the Association's theory, that is not the *only* purpose of Section 4(f)(2). Another purpose of Section 4(f)(2) is to permit involuntary retirements when the criteria of Section 4(f)(2) are met.

The Association's position that Section 4(f)(2) forbids involuntary retirement is not only contrary to the position asserted by McMann in his brief, but is also contrary to the position taken by the Secretary of Labor in his Interpretative Bulletin, to the Secretary of Labor's position before the Fourth Circuit in the case at hand and in other cases, to all Court decisions on the matter, and to Section 5 of the Act itself (29 U. S. C. § 624), which directs the Secretary of Labor to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement and report his findings and appropriate legislative recommendations to the President and to Congress.

In footnote 5 of its brief (p. 12), the Association attempts to dismiss the relevance of Section 5 to this case by asserting, with reference to the *Zinger* decision, that "it could be just as easily posited that the Act forbade involuntary retirement before the age of 65 and that Congress desired further data to determine if involuntary retirement at a later date should likewise be prohibited." This theory is untenable. Had Congress intended the Section 5 study to address only involuntary retirement after age 65, there would have been no need to provide, as Congress did in Section 3(b) of the Act (29 U. S. C. § 622(b)), that the Secretary submit a separate report on the advisability of the age 65 limit provided by the Act. Further, the Secretary of Labor's own interpretation of Section 5 recognizes that it applies to pre-age 65 retirements. In this connection, reference to Section 5 appears in the Interpretative Bulletin under the title "Involuntary Retirement Before Age 65". (See 29 C. F. R. § 860.110(b), published originally in 1968.)

In sum, the Association's theory that Section 4(f)(2) prohibits involuntary retirements is contrary to the Act itself and to all authorities which have interpreted the Act.

VIII.

THE ASSOCIATION'S ARGUMENT THAT THE LEGISLATIVE HISTORY CONCLUSIVELY PROVES THAT THE BENEFIT PLAN PROVISION WAS NEVER INTENDED TO PERMIT INVOLUNTARY RETIREMENT BEFORE THE AGE OF 65.

Carrying forward its theme that Section 4(f)(2) was not intended to permit involuntary retirements at all, the Association argues on pp. 13-21 of its brief that if Section 4(f)(2) admits of a contrary interpretation, then legislative history supports the view that involuntary retirements are prohibited.

The essence of the Association's argument is that Congress, in the final days of the Congressional session leading to a vote on the bill, referred to Section 4(f)(2) in the context of relieving the employer of the need to accommodate older applicants in benefit plans in order to facilitate their hire and "repudiated" the early "involuntary retirement" purpose of Section 4(f)(2). At the end of footnote 6 (Assoc. br., p. 17), the Association says with respect to Senator Javits that:

> "It is clear that the Senator, in his subsequent statements [*i.e.*, statements late in the session] intended to expressly repudiate any initial approval of the involuntary retirement feature of the Administration's bill."

The fact is that Senator Javits did not make any "subsequent statements" repudiating initial approval of the involuntary retirement feature of the Administration's bill. What actually transpired is that the involuntary retirement aspect of Section 4(f)(2) had been agreed upon and no longer required dialogue in Congress (See the legislative history cited hereinabove and in United's initial brief). Senator Javits' concern was that the exception did not go far enough, that it met "only part of the problem", and, therefore, should be "broadened" to include the exemption of older workers from existing benefit plans in order to facilitate their employment. Thereafter, the dialogue concerned the added, or broadened, aspect of Section 4(f)(2).

At no time, however, did Senator Javits "repudiate" his, or Congress', earlier approval of the involuntary retirement feature of Section 4(f)(2).

IX.

THE ASSOCIATION'S ARGUMENT THAT "DECISIONS OF LOWER COURTS INCONSISTENT WITH THAT OF THE COURT BELOW WERE BASED UPON THE UNCRITICAL ACCEPTANCE OF AN ERRONEOUS INTERPRETATIVE REGULATION OF THE SECRETARY OF LABOR OR WERE THE RESULT OF FAULTY ANALYSIS".

Earlier in this brief, United noted that McMann, in his brief, stated that the earlier Interpretative Bulletin issued by the Secretary of Labor and the current position of the Secretary of Labor were "compatible". The *amicus* Association does not agree. On page 23 of its brief, the Association asserts that "That interpretative regulation does not reflect the present thinking of the Secretary . . . as evidenced by the support given to the Respondent in the lower court and this Court, and by earlier Labor Department suits raising the same issue."

In substance, the Association endeavors to explain away decisions adverse to the plaintiffs in prior age discrimination cases, such as *Steiner* v. *National League*, 377 F. Supp. 945 (C. D. Cal. 1974), *aff'd without opinion*, No. 74-2604 (9th Cir. 1975) and *McKinley* v. *Bendix Corp.*, 420 F. Supp. 1001 (W. D. Mo. 1976) on the basis that these courts were misled by the initial Interpretative Bulletin. With respect to three other cases, which examined the question of whether Section 4(f)(2) could ever justify involuntary retirement before age 65; *i.e. Taft, supra, Dunlop* v. *Hawaiian Telephone Co.*, 415 F. Supp. 330 (D. Hawaii 1976), and *Zinger, supra*, the Association concludes that these courts were wrong because they analyzed the Act incorrectly.

With respect to *Taft*, the Association argues that it was incorrect for the Fifth Circuit to rule that the language of Section

4(f)(2) is plain, and at the same time reject the notion that an employer must rehire an employee it retired. However, the Association's argument that *Taft* was decided erroneously is based upon its own assumption, described earlier, that the language of Section 4(f)(2) permits of no involuntary retirement prior to age 65 and has for its sole purpose the employment of older workers. Thus, the Association cannot reconcile the *Taft* court's decision with its own position. As United pointed out earlier, Section 4(f)(2) has more than one purpose. It permits involuntary retirements which meet the conditions of Section 4(f)(2). It also permits the withholding of benefits from older workers in order to facilitate their hire. The Association's disagreement with *Taft* is grounded in its predetermination that Section 4(f)(2) authorizes only the latter exception.

With respect to *Dunlop, supra,* the Association notes its disagreement with the result reached in that case by explaining that the *Dunlop* court overlooked the most "obvious" meaning of Section 4(f)(2); *i.e.*, the meaning that "a newly hired worker may not be excluded from fringe benefits pursuant to the literal terms of a plan if the employer would not thereby be required to assume a disproportionately greater economic burden." Again, the Association's disagreement with *Dunlop* lies in its assumption that Section 4(f)(2) permits no involuntary retirements, an assumption unsupported by the facts.

The Association's disagreement with *Zinger* is twofold: First, it does not agree that involuntary retirements with substantial benefits, as contrasted to discharges or retirements without substantial benefits, were looked upon with favor and, second, it disagrees that the legislative history shows that involuntary retirements were intended to be part of Section 4(f)(2). According to the Association, Section 4(a) prohibits involuntary retirements and the distinction between discharges and involuntary resignations found by the *Zinger* court is erroneous. Also, according to the Association, the *Zinger* court failed to note that Senator Javits had expressly disavowed his initial approval of the involuntary retirement feature of Section 4(f)(2).

As noted earlier, however, Senator Javits did not disavow his approval of the involuntary retirement feature of Section 4(f)(2). Further, the *Zinger* court comprehensively traced the legislative history and correctly arrived at the conclusion that discharges were looked upon with disfavor, but that involuntary retirements were permitted by the Act as long as they were made pursuant to a *bona fide* benefit plan which was not a subterfuge to evade the purposes of the Act; *i.e.*, a benefit plan which paid reasonable benefits. Finally, the Act itself shows that discharges on the basis of age alone are impermissible, whereas the observance of the terms of *bona fide* benefit plans is permissible. Thus, the distinction between discharges and involuntary retirements made pursuant to *bona fide* pension plans paying reasonable benefits is a proper distinction.

CONCLUSION.

For the reasons set forth in this reply brief, the arguments advanced by McMann and the *amicus* Association in support of the Fourth Circuit's decision are in error.

United respectfully urges this Court to reverse the decision of the Fourth Circuit below, and affirm the judgment of the District Court in this case.

Respectfully submitted,

ARNOLD T. AIKENS,
KENNETH A. KNUTSON,
EARL G. DOLAN,
P. O. Box 66100,
Chicago, Illinois 60666,
Counsel for Petitioner.

Of Counsel:
PHILIP J. HOGAN.